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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

Barbara Allen; Richard Dippold; Melvin Jones; )  
Donald McCarty; Richard Scates and Walter G. )  
West, individually and on behalf of all others )  
similarly situated, )

Plaintiffs, )

vs. )

Honeywell Retirement Earnings Plan; )  
Honeywell Secured Benefit Plan; Plan )  
Administrator of Honeywell Retirement )  
Earnings Plan; and Plan Administrator of )  
Honeywell Secured Benefit Plan, )

Defendants. )

No. CV04-0424 PHX ROS

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
ON MINIMUM BENEFITS CLAIM**

## INTRODUCTION

Plaintiffs oppose Defendants' motion for summary judgment, (Doc. 510), which purports to address the remedies available to Plaintiffs on the Minimum Benefits Claim, but in reality seeks merely to re-litigate and avoid liability under the Court's 2005 summary judgment ruling. Defendants' attempt to re-argue the meaning of Plan Section 4.2 is nothing but a new spin on arguments that were or should have been asserted in opposition to Plaintiffs' motion for partial summary judgment or plead as affirmative defenses or counterclaims and should be rejected. This Court already ruled against Defendants on essentially the same Plan interpretation proffered here: that whenever a participant fails to transfer his Secured Benefit Account balance to the Plan, there *must* be a Secured Benefit Account Offset applied to the benefits. As the Court stated:

According to Defendants, the benefit payable under the Retirement Plan *must* be offset by the value of a participant's Secured Benefit Account whenever the participant elects not to transfer the balance of his Account into the Retirement Plan. The Plan, however, states otherwise.  
*Allen v. Honeywell Retirement Earnings Plan*, 382 F.Supp.2d 1139, 1163 (D.Ariz. 2005) (emphasis supplied). While only the second half of Defendants' motion actually admits that Defendants seek reconsideration,<sup>1</sup> Defendants' entire motion merely reargues the meaning of the same Plan provisions that were squarely at issue in the summary judgment ruling.

It is far too late in the day for Defendants to assert that they can avoid liability to Plaintiffs for unlawfully applying an SBA offset in the calculation of Plaintiffs' Minimum Benefits by now asserting for the first time, that under the Court's ruling, Defendants never should have paid Plaintiffs their Minimum Benefits in the first place. Defendants' motion goes to the heart of the merits of Plaintiffs' summary judgment motion and the Court's ruling that Defendants' unlawfully calculated Plaintiffs' Minimum Benefits with an SBA offset. If the Court finds that Defendants arguments are not merely a variation on the

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<sup>1</sup>Pursuant to Local Rule 7.2(g), Plaintiffs do not address Defendants' alternative third motion for reconsideration. (Doc. 510 pp. 10-16.) In the event the Court determines to consider it, Plaintiffs request an opportunity to respond.

1 arguments already rejected under the Court's summary judgment ruling, then Defendants  
2 arguments should now be rejected for not having been presented in opposition to Plaintiffs'  
3 motion. Although the Court held, that because the ruling on Defendants' Motion to Dismiss  
4 and Plaintiffs cross motion for summary judgment was entered before the Class was certified,  
5 its ruling did not foreclose Defendants from "asserting affirmative defenses related to  
6 individual putative class members' claims," (Doc. 124 p.15), Defendants were obviously  
7 required to actually assert such defenses. Yet Defendants failed to assert the affirmative  
8 defense raised here - that under the Court's ruling, Defendants paid Plaintiffs Minimum  
9 Benefits under the Plan through unilateral mistake or that Defendants can avoid or  
10 effectively offset payment of benefits to Plaintiffs because they are not really entitled to any  
11 Minimum Benefits and have been overpaid, in effect claiming recoupment or offset.<sup>2</sup>  
12 Defendants' failure to assert affirmative defenses and/or counterclaims in their Answer to  
13 the Amended Complaint filed in August 2005 is fatal and bars Defendants from raising these  
14 defenses at this late date.

15 The Court granted Plaintiffs' summary judgment motion finding Defendants  
16 unlawfully applied an SBA Offset to Plaintiffs' Minimum Benefits. *Allen*, 382 F. Supp. at  
17 1161-64. Defendants argue that there should be no liability because Defendants never should  
18 have paid Plaintiffs any Minimum Benefits at all. But that argument seeks to undo the  
19 Court's ruling. The Court could not have found that Defendants wrongfully applied an SBA  
20 Offset to Plaintiffs' Minimum Benefits if, as Defendants now assert, Plaintiffs had no

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21  
22 <sup>2</sup>It is not Plaintiffs' duty to deconstruct and properly characterize Defendants' unplead  
23 affirmative defenses or counterclaims. With regard to the issue of whether Defendants  
24 waived their defense, it makes no difference whether the unarticulated basis of Defendants'  
25 proffered but meritless grounds for avoidance should have been plead as unilateral mistake,  
26 recoupment, set-off or the like or whether Defendants should have raised their arguments by  
27 way of counterclaim or affirmative defense. The result is the same: four years after their  
28 answer was filed and having failed to comply with the requirements of Fed. R. Civ. P. 8 (b)  
and (c) and 13(a), Defendants do not get to litigate "any matter constituting an avoidance or  
affirmative defense" that was never plead and that would operate as a bar, offset or  
avoidance of Plaintiffs' rights to recover their Minimum Benefits without an SBA offset.

1 entitlement to such benefits. Defendants' motion is nothing more than a thinly veiled attempt  
2 to escape liability through unplead affirmative defenses and/or unasserted compulsory  
3 counterclaims and through yet another round of argument regarding the meaning of the Plan  
4 that was already argued or should have been argued more than four years ago.

5 Despite two prior motions for reconsideration (Doc. 79, 323), denial of Defendants'  
6 petition for an interlocutory appeal, (Doc. 142), and denial of Defendants' motion to amend  
7 their Answer (which never raised this defense), (Doc. 306), Defendants now purport to assert  
8 a new unplead affirmative defense that despite 25 years of providing Minimum Benefits to  
9 Plaintiffs, the Plan does not afford the right to receive Minimum Benefits without an SBA  
10 offset and therefore Plaintiffs' benefits should not be re-calculated without an SBA offset.  
11 Defendants' arguments, (advanced by the fourth law firm to appear for Defendants in this  
12 litigation), are written as though Defendants are writing on a clean slate. Defendants' motion  
13 is in conflict with the facts that: 1) in opposing summary judgment, Defendants failed to  
14 argue that liability should not attach because Plaintiffs had no right to Minimum Benefits and  
15 repeatedly conceded that the Plan does afford a right to Minimum Benefits, (Doc. 31); 2)  
16 Defendants failed to introduce any admissible evidence regarding the intent of Section 4.2  
17 and the Court struck the only proffered evidence on this subject, (Doc.72, pp. 3-4); 3)  
18 Defendants expressly disavowed any right to seek reconsideration on the Minimum Benefits  
19 Claim in 2005, (Doc.79, p. 1 n.1) (yet without advancing any grounds for nullifying that  
20 disavowal or justifying a four year delay, ask for reconsideration); 4) Defendants failed to  
21 assert these affirmative defenses or counterclaims in their answer, (Doc. 78), and 5)  
22 Defendants did not even assert this belated defense in their motion to amend the answer,  
23 (which was denied, (Doc. 255, p. 306)). Indeed, at no time during the pendency of this case  
24 or Plaintiffs' administrative claims filed in 2002 did Defendants ever assert that payment of  
25 Minimum Benefits under the Plan was all a big mistake or that Defendants should be relieved  
26 of the obligation to provide Plaintiffs with their Minimum Benefits without an SBA offset  
27 because Plaintiffs were never entitled to those benefits in the first place.

## SUMMARY OF ARGUMENT

Defendants' motion is in conflict with the clear language and structure of the Plan and established principles of contract interpretation. Defendants' motion should be denied and the Court should rule that Plaintiffs are entitled to calculation of their Minimum Benefits under the Plan without an SBA offset and with Interest and attorneys' fees as provided in the Partial Settlement Agreement, (Doc. 312, Exh. A, because:

1. Defendants' proffered interpretation is barred by Defendants' contrary admissions;
2. Defendants are barred or waived their rights to argue their proffered interpretation of Plan § 4.2 by rejection of that interpretation in the Court's summary judgment ruling or by failing to assert their proffered interpretation in opposition to Plaintiffs' motion for summary judgment;
3. Defendants waived their rights to claim that Plaintiffs are not entitled to their Minimum Benefits under the Plan by failing to plead these grounds for avoidance, unilateral mistake, recoupment or set-off as affirmative defenses/counterclaims in their Answer. The deadline for amendment of the Answer has long since passed and Defendants' actual motion to amend their Answer (which failed to assert these affirmative defenses) was denied in August 2007 (Doc. 306) and not renewed. Such defenses are, in any event, meritless;
4. Defendants also failed to raise these defenses or assert their belated interpretation of the Plan in the administrative claims process as a basis for denying Plaintiffs' claims. Courts require plan administrators to set forth every reason for denial of a claim so that participants can be fully informed and make a reasonable determination about whether to appeal the claim or whether to pursue claims that are denied. Courts will not consider issues outside of the administrative record nor credit the litigating the positions of counsel as proxies for interpretations of the plan by the plan administrator;
5. Consideration of these affirmative defenses/counterclaims now would be extremely prejudicial to Plaintiffs;
6. In the event the Court is inclined to consider the merits of Defendants' motion, it should be denied as it fails under the plain language of the Plan and under established principles of contract interpretation.

### **The Court's Minimum Benefits Ruling**

In its opinion dated July 24, 2005 the Court ruled in Plaintiffs' favor that :

The unambiguous terms of the Signal Retirement Plan do not permit a Secured Benefit Account offset to the minimum benefit formulas contained in § 4.2(c). The Court will therefore grant Plaintiffs' request for partial summary judgment on this ground and deny Defendants' Motion to Dismiss.

1 *Allen v. Honeywell Retirement Earnings Plan*, 382 F.Supp.2d 1139, 1164 (D.Ariz. 2005).  
 2 The Court's holding was based on a careful analysis of the language of the Plan. At several  
 3 points in its opinion, the Court found that (like Defendants' unsupported and conclusory  
 4 assertions on this motion), Defendants had failed to support their claims regarding the  
 5 meaning of the Plan.<sup>3</sup> Defendants do not get a do-over on the meaning of Plan § 4.2 under  
 6 the guise of remedy. Defendants' new motion presents no grounds to revisit the Court's  
 7 well-reasoned decision on the Minimum Benefits Claim, is highly prejudicial to Plaintiffs  
 8 and constitutes a colossal waste of judicial resources.

9 **I. DEFENDANTS HAVE ADMITTED PLAINTIFFS ARE ENTITLED TO**  
 10 **MINIMUM BENEFITS**

11 The Plan provides both Minimum Benefits and Basic Benefits and Defendants have  
 12 always calculated Plaintiffs' benefits under both formulas and have applied the greater of the  
 13 two. (*See* Doc. 31, p.4.) The Minimum Benefits Formula incorporates the old Garrett  
 14 benefits formula, (Doc. 351 ¶ 21), and provides two formulas for a floor or minimum level  
 15 of benefits.

16 Defendants have admitted that Plaintiffs are entitled to the greater of the Basic  
 17 Formula or the Minimum Benefits Formula under the Plan. Defendants repeatedly asserted  
 18 that benefits are first calculated under § 4.2(b) (the Basic Formula) and then a second  
 19 calculation is made under § 4.2(c) (the Minimum Benefit Formula) and that retirees receive  
 20 the greater of the benefits calculated under the two formulas:

21 The "minimum benefit" formula refers to an alternative benefit formula in the  
 22 Retirement Plan that provides a minimum annuity at retirement. Again an  
 23 explanation is in order.

24 Generally, a participant's Retirement Plan benefit is calculated under one of  
 two main formulas. Pension benefits are first calculated under § 4.2(b) of the  
 Retirement Plan, which provides a relatively generous formula, but which also  
 contains an offset (i.e., a reduction) for estimated Social Security benefits (the

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25 <sup>3</sup>The Court found, *inter alia*, that Defendants "have not identified any alleged  
 26 ambiguity." *Allen*, 382 F. Supp. 2d at 1162, that Defendants made "unsupported assertions  
 27 regarding the intent of the Plan cannot overcome the clear language of the Plan"; *id.* at 1163,  
 28 and that Defendants "have produced no evidence" that Plaintiffs' interpretation of §  
 4.2(e)(i)(b) would defeat "the purpose of the Minimum Benefit." *Id.*

“basic formula”). (Dec. Ex. E § 4.2(b) at HW0000336). However, the calculation does not stop there. A second, alternative calculation is then made under § 4.2(c), which provides a less generous formula, but which does not contain a Social Security offset (the “minimum formula”). (*Id.* at §4.2(c).) The minimum formula generally, but not always, yields a smaller net annuity than the basic formula. ***Retirees receive the greater of the minimum formula benefit or the benefit calculated using the basic formula***. (*Id.* at § 4.2 at HW0000336-340.)

Defendants’ Motion to Dismiss, (Doc. 15, p 21, emphasis supplied.) In opposing Plaintiffs’ motion for summary judgment on Plaintiffs’ claim that Defendants’ application of an SBA Offset to the Minimum Benefits Formula was in conflict with the Plan, Defendants again explicitly admitted:

the Retirement Plan calculates a participant’s benefit under one of two main formulas: the “basic formula” described in Section 4.2(b) of the Retirement Plan and the “minimum formula” described in Section 4.2(c). ***Retirees receive the greater of the basic formula benefit or the minimum formula benefit.***

(Defendants’ Opp. to MSJ, Reply on Motion to Dismiss, Doc. 31, p. 24, emphasis supplied.) Defendants made the same admission in the administrative claims process. (*See* Doc. 16, Exh. K p. 8, at HW000471.) Defendants made the same admission in the administrative claims process and in the denial of Plaintiffs’ administrative appeal. (*Id.* Exh. K p. 8, at HW0000471.)<sup>4</sup>

Defendants made these admissions with full knowledge since 2002 (when Plaintiffs filed their administrative claim) that Plaintiffs seek their Minimum Benefits calculated without an SBA Offset. (*See*, e.g. Doc. 16, Exh. I, p. 2.) Defendants never asserted that if Plaintiffs’ claims were successful, Defendants could avoid liability by challenging Plaintiffs’ rights to receive their Minimum Benefits. In light of these admissions, Defendants cannot argue that Plaintiffs are not entitled to Minimum Benefits under the terms of the Plan.

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<sup>4</sup>Defendants also argued that the 1993 revision was merely a clarification of the earlier Plan and that the Minimum Benefits Formula was always intended to apply regardless of whether the participant transfers his SBA to the Plan. (Doc. 31, p. 28 n.23.) Defendants’ 1993 Plan revision confirms that the Plan was never intended to deprive participants who failed to transfer their SBA balances to the Plan of the right to receive Minimum Benefits. Indeed



1 *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003)  
 2 (recognizing statements of counsel as judicial admissions). *See* 10A C. Wright, A. Miller &  
 3 M. Kane, *Federal Practice and Procedure* § 2723, pp. 64-66 (1983); *Kosen v. Ruffing*, 2009  
 4 WL 56040, at \* 8 (S.D.Cal. Jan. 7, 2009) (representation as to the amount in controversy  
 5 held to be enforceable judicial admission on the issue of amount in controversy at time of  
 6 removal).

7 **II. DEFENDANTS' FAILURE TO PLEAD THIS DEFENSE OR RAISE IT IN**  
 8 **OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**  
 9 **BARS DEFENDANTS FROM ASSERTING IT**

10 Defendants seek to avoid payment of the difference between Plaintiffs' Minimum  
 11 Benefits calculated with an SBA Offset and the Minimum Benefits Defendants actually paid  
 12 based on unplead affirmative defenses or a heretofore rejected or un-argued interpretation  
 13 that "participants who retain their SBAs are not entitled to § 4.2(c) benefits to begin with."  
 14 (Doc. 510 p. 4.) Defendants misstate the Court's ruling by asserting that "under the Court's  
 15 analysis, participants who retained their SBAs never should have received their Normal  
 16 Retirement Benefit calculated under § 4.2(c)." The Court said nothing of the kind.<sup>5</sup> To the  
 17 contrary, the Court rejected Defendants' argument that "the benefit payable under the  
 18 Retirement Plan *must* be offset by the value of a participant's Secured Benefit Account  
 19 *whenever* the participant elects not to transfer the balance of his account into the Retirement  
 20 Plan," (Doc. 31), and held "[t]he Plan however states otherwise."

21 Defendants' argument is nothing but a thinly veiled attempt to litigate an unplead  
 22 affirmative defense: that under the Court's interpretation Defendants mistakenly paid  
 23 Minimum Benefits to Plaintiffs in the first place. Such defense (or counterclaim) cannot

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24 <sup>5</sup> Defendants' argument that the Court's ruling creates a "windfall," (Doc. 510 p. 4),  
 25 is baseless, and like their opposition to Plaintiffs' motion for summary judgment, is  
 26 unsupported by a scintilla of evidence. Further, as the Court already noted, the Minimum  
 27 Benefits formula has smaller multipliers than the Basic Formula. In any event, it is not a  
 28 "windfall" for Plaintiffs to receive benefits in accordance with written provisions of the Plan.  
*Call v. Ameritech Management Pension Plan*, 475 F.3d 816, 822-23 (7th Cir. 2007) (*cert.*  
*denied* 128 S.Ct. 2900 (2008)).



succeed because Defendants have never plead it. Rule 8 of the Federal Rules of Civil Procedure provides in no uncertain terms that “In responding to a pleading, a party must affirmatively state *any* avoidance or affirmative defense”(emphasis supplied).<sup>6</sup> Such defenses are affirmative defenses or counterclaims that must be plead. Defendants’ failure to do so resulted in waiver of that defense:

Generally speaking, the rule's reference to ‘an avoidance or affirmative defense’ encompasses two types of defensive allegations: those that admit the allegations of the complaint but suggest some other reason why there is no right of recovery, and those that concern allegations outside of the plaintiff's prima facie case that the defendant therefore cannot raise by a simple denial in the answer.

Wright & Miller, 5 *Federal Practice and Procedure* § 1271. Defendants’ proposed new defense fits squarely within the definition of affirmative defense, which was waived when Defendants failed to plead it: “ It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case.” Wright & Miller, 5 *Federal Practice and Procedure* § 1278. See, e.g., *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (“Failure to raise an affirmative defense below results in waiver.”). Richard A. Lord, 27 *Williston on Contracts* § 70:15 (4th ed.) (“Where applicable, mistake must be raised immediately as an affirmative defense in a defendant's answer to a complaint, such as pleading fraud ‘or any other matter constituting an avoidance or affirmative defense.’ ...In all cases, the failure to raise an affirmative defense in answer to a complaint may serve to waive that defense. ”); CJS *Contracts* § 676 (“The defense of a mistake of law cannot be asserted in a breach of contract action where it is not pled.”) .

Similarly, Rule 13 of the Federal Rules of Civil Procedure provides:

**(a) Compulsory Counterclaim.**

**(1) In General.** A pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

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<sup>6</sup>Defendants even failed to raise this defense in their proposed amended answer, (Doc. 255), which the Court denied nearly two years ago. (Doc. 306.)

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and  
 (B) does not require adding another party over whom the court cannot acquire jurisdiction.

See 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1409 (2d ed. 1987) (discussing, as a compulsory counterclaim, a “counterclaim interposed solely to defeat or diminish plaintiff’s recovery [which] is analogous to the common law claim for recoupment.” ).

In *Shah v. General Motors Corp.*, 2008 WL 4585237, at \* 5 (E.D.Mich. Oct. 14, 2008), for example, an ERISA case, the court refused to entertain the defendant’s claim that in the event the plaintiff was found to be entitled to benefits, the plan was entitled to recoup money it claimed that it had overpaid, because the defendant plan never plead such defense or asserted a counterclaim: “The Court will not analyze this argument until Defendant properly asserts a claim against Plaintiff.” *Id.* at \*5. See also *Robbins Hardwood Flooring, Inc. v. Bolick Distributor Corp.*, 2003 WL 22427097, at \* 2 (5th Cir. 2003) (“Nor has Bolick provided any reason why its claim was not pleaded or attempted to show that amendment would not be prejudicial to Robbins. Bolick has never even requested that it be allowed to amend its pleadings. In light of this, we find it clear that the trial court did not abuse its discretion in refusing to allow amendment of Bolick's pleading to allege a counterclaim of setoff or recoupment.”); *Buder v. U.S.* 436 F.3d 936, 938 (8th Cir. 2006) (“Equitable recoupment is an affirmative defense; it is an equity-based remedy available to [the Government] here only to prevent Plaintiffs' unjust enrichment.”); *United States v. Munoz*, 746 F.2d 1389, 1390 (9th Cir. 1984) (refusing to consider unplead defense of recoupment).

In 2006, Defendants belatedly recognized that they failed to plead all their defenses and moved to amend the Answer. (Doc. 255.) However, even that tardy motion which the Court denied, made no reference whatsoever to the defense being asserted here although Defendants claimed that at least two of their “proposed new defenses acknowledge the Court’s ruling and address possible remedies in light of that ruling.” (Doc. 263 p. 3.) Two

of Defendants' proposed amendments were expressly addressed to the Court's Minimum Benefits ruling:

**EIGHTH AFFIRMATIVE DEFENSE**

...In its July 19, 2005 Opinion, the Court found that the "provided in subparagraph (b)" language of §4.2(e)(i)(b) of the Signal Retirement Plan unambiguously excludes the Minimum Benefit formula. To the extent that the Plan is so construed, that construction creates a scrivener's error, and the relevant plan provision should be reformed to conform to the settlor's original intent.

**NINTH AFFIRMATIVE DEFENSE**

...In its July 19, 2005 Opinion, the Court found that the "provided in subparagraph (b)" language of §4.2(e)(i)(b) of the Signal Retirement Plan unambiguously excludes the Minimum Benefit formula. To the extent that the Plan is so construed, that construction renders that provision *ultra vires* and unenforceable, and the relevant plan provision should be reformed to strike the unauthorized plan terms.

(Doc. 265 p. 24.) Plaintiffs opposed the motion and on August 1, 2007, the Court denied the motion, stating that if settlement could not be reached Defendants could renew their motion. (Doc. 306.) Defendants never renewed their motion.

Against this backdrop, allowing Defendants to litigate an unplead affirmative defense or counterclaim at this point would be beyond any semblance of reason. The deadline for amending the Answer was December 11, 2006. Since that date, Defendants, either on their own or jointly with Plaintiffs, submitted 5 proposed Scheduling Orders, each of which maintained the December 11, 2006 deadline on motions to amend the Answer. (Doc. 278, 290, 310, 466, 483.) A written stipulation of partial settlement was filed on October 26, 2007, (Doc. 312), which was preliminarily approved by the Court on November 6, 2007, (Doc. 319), and finally approved on February 8, 2008. (Doc. 402.) That settlement provided, *inter alia*, for dismissal of several claims and that the parties would litigate the Three Remaining claims with a cap on damages. Following preliminary approval of the Partial Settlement, on November 16, 2007, Defendants moved for reconsideration of the ERISA § 204(g) claims, (Doc. 323), never asking for reconsideration of the Minimum Benefits Claim and never attempting to renew the motion to amend the Answer.

In the unlikely event Defendants are permitted to litigate their unplead avoidance defenses or counterclaims, Defendants' motion should still be denied. There was no evidence

on summary judgment and no evidence on this motion that Defendants were mistaken as to any of the contract terms such that Defendants could avoid having to make Plaintiffs whole for their Minimum Benefits without an offset. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 299 F.3d 769, 783 -84 (9th Cir. 2002) (“In this case, Kyocera cannot reasonably be considered as having made a mistake of fact. There was no inadvertent clerical error, and Kyocera did not misapprehend a term in the contract through unconscious ignorance or forgetfulness of a material fact. Rather, ...Kyocera had actual knowledge of the term at issue.”). Even if there were, Defendants cannot renege on their promise to participants to provide the greater of the Basic Formula or the Minimum Benefits Formula based on their own unilateral mistake. *See Bianchi v. Perry*, 140 F.3d 1294, 1298-99 (9th Cir. 1997). (“If the government mistakenly overlooked its rights (and it may not have), then its own negligent error does not entitle it to renege on its commitment.”) (*citing Restatement of Restitution* § 12 ( unilateral mistake not grounds for restitution). Defendants can only recover on a theory of mistake if they did not bear the risk or if there is some sort of unconscionability. *Restatement (Second) of Contracts* § 153.

### **III. DEFENDANTS WAIVED THEIR DEFENSES BY FAILING TO INCLUDE THEM AS A BASIS FOR DENIAL OF PLAINTIFFS’ CLAIMS IN THE ADMINISTRATIVE CLAIMS PROCESS**

Defendants are also barred from arguing their defense because it was never advanced by the Plan Administrator when it denied Plaintiffs’ administrative claims and appeal. A plan administrator is required to state all the reasons for denying a participant’s claims. This is so because a participant is entitled to evaluate whether to appeal the decision or whether to file suit after an appeal is denied. Surely, if Defendants believed that as a result of Plaintiffs’ claims to have their benefits calculated without an SBA offset, Defendants would be able to claim that they had forfeited their right to receive Minimum Benefits altogether, such basis for denying Plaintiffs’ claims should have been clearly articulated in the administrative

1 claims process.<sup>7</sup> *Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1221 (10th Cir. 1992)  
 2 (where treatment was provided by dentist, but policy provision requiring treatment by  
 3 "physician or surgeon" not raised in denial, there was "a tacit admission by MetLife that it  
 4 construed its own policy . . . to include dentists"). *See Abatie v. Alta Health & Life Ins. Co.*,  
 5 458 F.3d 955, 970 (9th Cir. 2006) ("in general, a district court may review only the  
 6 administrative record when considering whether the plan administrator abused its  
 7 discretion..."). *See, e.g., Reich v. Ladish Co., Inc.*, 306 F.3d 519, 524 n. 1 (7th Cir. 2002)  
 8 ("Ladish was required to give Reich every reason for its denial of benefits at the time of the  
 9 denial."); 29 U.S.C. § 1133 (plan administrator must state "specific reasons" for denial of  
 10 claim); *University Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 23 EB Cases  
 11 2689 (6th Cir. 2000) (one administrative committee member's testimony cannot "shore-up"  
 12 inadequate denial letter); *Skretvedt v. E. I. Dupont de Nemours & Co.*, 268 F.3d 167 (3d Cir.  
 13 2001); *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 620 (8th Cir. 1998) (argument  
 14 regarding interpretation of SPD rejected because it was not a contention made by Plan  
 15 Committee in its claim denial letter); *Peruzzi v Summa Medical Plan*, 137 F3d 431, 435 (6th  
 16 Cir. 1998) ("We are doubtful that Peruzzi may properly raise this argument now because it  
 17 is unclear that he presented it to the plan administrator"); *Shelden v. Barre Belt Granite*, 25  
 18 F.3d 74 (2d Cir. 1994) (district court cannot affirm denial of benefits by ascribing to plan a  
 19 reason for denial other than one proffered to claimant); *Matuszak v. Torrington C.*, 927 F.2d  
 20 320, 322-23 (7th Cir. 1991) ("post hoc" reasons advanced by counsel are not entitled to abuse  
 21 of discretion review); *Sandoval v. Aetna Life*, 967 F.2d 377 (10th Cir. 1992) (refused to  
 22 consider "arguments" not advanced to the trustees, as "a curtain falls when the fiduciary  
 23 completes its review"); *Doe v. Group Hospitalization*, 3 F.3d 80 (4th Cir. 1993) (refused to  
 24 consider "reasons" not given to the participant).

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 26 <sup>7</sup>Defendants have not indicated how they Plan to treat Plaintiffs' rights to future  
 27 Minimum Benefits under the Plan, including for participants who have not yet retired. To  
 28 suggest that these rights could be eviscerated on the remedies stage of this case with no  
 notice, pleading or discovery defies logic.

1 Plaintiffs' administrative claims were filed in 2002. Plaintiffs asked that their benefits  
2 be recalculated without an SBA offset. Defendants cannot seven years after denial of  
3 Plaintiffs' claims, five years after the Complaint was filed and almost four years after  
4 summary judgment was granted assert that yet another basis exists to deny Plaintiffs' claims  
5 to have their Minimum Benefits calculated without an SBA Offset.

6 **IV. ALLOWING DEFENDANTS TO LITIGATE THEIR DEFENSE IS HIGHLY**  
7 **PREJUDICIAL TO PLAINTIFFS**

8 Allowing Defendants to assert an affirmative defense or counterclaim at this point,  
9 would be extremely prejudicial. Defendants never raised it in the administrative claims  
10 process and never raised it in its Answer. The deadline for a motion to amend the Answer  
11 was more than two years ago. (*See, e.g.*, Doc. 484, p. 1 ¶ C.) To summarize, Plaintiffs  
12 submitted expert reports in this case nearly a year ago, and Defendants have deposed  
13 Plaintiffs' expert twice. (SOF Exh. A ¶ 2-3; Doc. 436.) The current Scheduling Order  
14 provides for a period of only 60 days to complete discovery following the ruling on  
15 Plaintiffs' pending motion to compel, as to which Magistrate Duncan was appointed  
16 SpecialMaster on February 3, 2009. Raising the defense at this juncture, five years after the  
17 case was filed, more than three years after the Court's summary judgment ruling, a year after  
18 Plaintiffs' expert disclosures were made and with very little time to conduct any discovery  
19 on the new defense would be highly prejudicial. Defendants should not now be allowed to  
20 assert a new defense. *See Kontrick v. Ryan*, 540 U.S. 443, 460 (2004) (affirming denial of  
21 leave to amend to assert statute of limitations defenses after summary judgment ruling: "No  
22 reasonable construction of complaint-processing rules, in sum, would allow a litigant situated  
23 as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case  
24 on the merits."). Raising this defense now would effectively launch a new lawsuit. As one  
25 court stated:

26 No party, plaintiff or defendant, is permitted to stand his case before the court  
27 on some of its legs, and if it falls, set it up again on the rest in a subsequent  
28 proceeding, and thus evade the bar of the former judgment. Therefore, we  
cannot authorize a plaintiff to launch a new lawsuit through amendment after  
a final decision on summary judgment nor can we permit a defendant to utilize



1 a new defense following a ruling on summary judgment in plaintiff's favor as  
2 to liability.

3 *McDaniel v. City of Griffin*, 636 S.E.2d 62, 65 (Ga. App. 2006) (citations omitted). *See*  
4 *Singh v. City of Oakland*, 295 Fed.Appx. 118, 122 (9th Cir. Sept. 3, 2008);  
5 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006); *Jackson*  
6 *v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990); *Frazier v. Boomsma*, 2008 WL  
7 3073150, at \* 2 (D.Ariz. Aug. 4, 2008) (parties “wholly unjustified delay in reversing her  
8 position would defeat a motion to amend her answer, if a motion had been filed. Her delay  
9 would weigh similarly against abandoning the schedule set out in the case management  
10 order.”) (citations omitted); *USX Corp. v. Barnhart*, 395 F.3d 161, 168 (3d Cir. 2004);  
11 *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 489 (7th Cir. 1997).

12 **V. DEFENDANTS’ PROFFERED INTERPRETATION IS CONTRADICTED BY  
13 THE PLAIN LANGUAGE OF THE PLAN**

14 Even if the Court were to consider Defendants’ arguments on the merits, Defendants’  
15 motion should be denied as the argued for interpretation is unsupported by the language of  
16 the Plan and established principles of contract interpretation. The Court will search in vain  
17 in Defendants’ motion for any analysis of how § 4.2(e), the SBA offset provision, somehow  
18 overrides or negates § 4.2(c), the Minimum Benefits provision, or for that matter, any  
19 analysis of the interplay between the relevant sections. In fact, Defendants’ proffered  
20 interpretation would effectively read § 4.2(c) out of the Plan in its entirety along with the first  
21 sentence of § 4.2(b), which provides that the Basic Formula needs to take into account the  
22 Minimum Benefits Formula, the adjustment contained in § 4.2(e) and the other provisions  
23 of §4.2. However, § 4.2(b) is expressly conditioned on subsections 4.2(c) through (k):

24 (b) Except as provided in subsections (c) through (k), his Normal Retirement  
25 Benefit shall be:

26 (i) 1.5% of his Average Final Compensation multiplied by his Credited  
27 Service, minus

28 (ii) 1.5% of his Primary Social Security Benefit multiplied by his  
Credited Service (not in excess of 33 1/3 years)...

(Doc. 16, Exh. H, § 4.2(b), at HW0000336.)



1 The Minimum Benefits Formula, § 4.2(c), guarantees that the benefits for a former  
 2 participant in the Garrett Plan, shall not be lower than the minimum set forth in that provision  
 3 “except as provided in subsections (d) through (k).” Subsection (e), which contains the SBA  
 4 offset provision, does not, as the Court determined, apply to § 4.2(c). Section 4.2(c)  
 5 provides:

6 c) A Participant’s Normal Retirement Benefit ***shall not***

7 (i) in the case of a Participant who had his Separation from the  
 8 Service at the time he was employed by The Signal Companies,  
 9 Inc., Signal Properties, Inc, Signal Landmark, Inc., The Garrett  
 10 Corporation, or Industrial Turbines International, Inc. and  
 except as provided in subsections (d) through (k), be less than  
 the greater of (a) \$20.00 times his Credited Service, or (b) 1%  
 of his Average Final Compensation multiplied by his Credited  
 Service...

11 (Doc. 16, Ex. E, at HW 0000336 (emphasis supplied).)

12 Section 4.2(e) provides:

13 (e) The Normal Retirement Benefit of a Participant employed by a Company  
 14 specified below shall be adjusted as follows:

15 (i) In the case of a Participant who holds or has held an account  
 16 in the Garrett Secured Benefit Account in The Signal  
 Companies, Inc. Savings and Stock Purchase Plan (the “Savings  
 Plan”), his Normal Retirement Benefit shall be,

17 (a) in the case of a Participant who elects pursuant to the  
 18 Savings Plan to transfer his entire account balance held in the  
 Garrett Secured Benefit Account to this Plan, the Normal  
 Retirement Benefit provided hereunder without regard to this  
 19 subparagraph (e) and

20 (b) in the case of a Participant who elects pursuant to the  
 21 Savings Plan not to transfer his account balance in the Garrett  
 Secured Benefit Account to this Plan, the Normal Retirement  
 Benefit provided under subparagraph (b) of this Section 4.2,  
 22 offset by the value of the account balance not transferred (the  
 “Offset”). ...

23 (Doc. 16, Ex. E, at HW 0000337.)

24 Under the unambiguous terms of the Plan, the Basic Formula, (§ 4.2(b)), is expressly  
 25 subject to Subsections (c) and (e). Section 4.2(e) begins with “The Normal Retirement  
 26 Benefit of a Participant employed by a Company specified below shall be *adjusted* as  
 27 follows...” and that sentence continues and does not end until after the provision in §  
 28

1 4.2(e)(i)(b) providing that the Normal Retirement Benefit under § 4.2(b) (but not § 4.2(c))  
 2 is to be offset. Defendants' motion omits the introductory clause of § 4.2(e), which places  
 3 the entire provision in context as setting forth *adjustments*. Defendants read out the word  
 4 "adjustment" from the sentence and thereby mischaracterize the meaning and import of §  
 5 4.2(e). The focus of the provision is on the various offsets and adjustments to some or all  
 6 of the benefit formulas and how and whether they are to be applied.<sup>8</sup> In conflict with that,  
 7 Defendants address only two words in isolation, the "shall be" in § 4.2(e)(i) without any  
 8 acknowledgment or reference to the fact that § 4.2(e)(i) is part of the same sentence that  
 9 follows the words "shall be adjusted" in § 4.2(e). Defendants' argument and selective  
 10 quotation of § 4.2(e)(i), as limiting the formula available to a participant who does not  
 11 transfer his SBA, rather than merely providing for the type and scope of the adjustment,  
 12 distorts the meaning of that section, which, with respect to Garrett Plan participants, provides  
 13 for an SBA offset adjustment to the Basic Formula but does not limit nor does it purport to  
 14 limit application of the formula under § 4.2(c). The Minimum Benefits formula under §  
 15 4.2(c) always follows the computation of the benefit in § 4.2(b). Nothing in § 4.2(e) changes  
 16 that result.

17 Defendants' argument that benefits for participants in the Garrett Plan are to be only  
 18 the benefits under § 4.2(b) with an SBA Offset, also fails to offer any rationale for why §  
 19 4.2(c) should be effectively written out of the Plan when, under the Basic Formula of §  
 20 4.2(b), both §§ 4.2(c) and 4.2(e) apply and nothing in § 4.2(e) purports to modify or eliminate  
 21 application of subsection (c). Defendants have not even attempted to explain why, after  
 22 calculating the benefits under § 4.2(b) with an SBA offset, § 4.2(c), the Minimum Benefits  
 23 Formula, would not continue to apply, as directed by the express terms of Basic Formula  
 24 itself. In other words, Defendants have not shown, nor could they, that § 4.2(e)'s adjustment  
 25

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26  
 27 <sup>8</sup>See, for example, § 4.2(e)(ii), (Ampex Corporation employee's "Normal Retirement  
 28 Benefit shall be offset..."); § 4.2(e)(iii) (Equity Plan participants' "Normal Retirement  
 Benefit shall be increased by the greater of...."). (Doc. 16, Exh. E, at HW0000338.)

1 and offset somewhat overrides and eliminates the Minimum Benefit Formula under § 4.2(c).  
 2 Given that the Basic Formula spells out that it is subject to both §§ 4.2(c) and (e) and that the  
 3 Minimum Benefits Formula is unaffected by § 4.2(e), it is simply not plausible to argue that  
 4 § 4.2(e), the adjustment provision, somehow negates the important protections contained in  
 5 § 4.2(c).

6 In fact, Defendants' argument would eviscerate not only § 4.2(c) but other provisions  
 7 of § 4.2 as well. For example, Defendants' strained interpretation would also nullify §  
 8 4.2(h). Section 4.2(h) expressly modifies § 4.2(c)(i) and (c)(ii) by directing that a participant  
 9 who is transferred from a (c)(i) (former Garrett Plan) company to a (c)(ii) company shall have  
 10 his benefit calculated as though the employee had at all times been employed by his employer  
 11 on the date of his separation from service. Under Defendants' argument, a Garrett employee  
 12 would never be accorded the rights provided under § 4.2(h) because, according to  
 13 Defendants, their benefits "must" only be determined under § 4.2(b). But that is not what the  
 14 Plan says.<sup>9</sup> Each section contains parallel mandatory language: one dictating that benefits  
 15 "shall not" be less than the stated minimum and one directing that benefits "shall be  
 16 *adjusted*" as outlined in the provision. Both apply with specificity to Garrett Plan  
 17 participants and neither modifies or is modified by the other. Given that Defendants offer  
 18 no analysis nor legal support for any claim that § 4.2(e) could somehow trump § 4.2(c) and  
 19 other provisions that follow, Defendants' motion should be denied.<sup>10</sup>

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21 <sup>9</sup>In opposition to Plaintiffs' summary judgment motion, Defendants asserted that the  
 22 offset formulas applied to all the provisions of § 4.2(b) through (k). As in the Court's  
 23 summary judgment ruling, reference to the remaining subsections 4.2 buttress the conclusion  
 24 that § 4.2(e) does not invalidate Section 4.2(c) or any of the other subparagraphs. The Plan's  
 25 argument runs counter to the well-established principle that contracts should be interpreted  
 26 in a manner so as to give effect to each of its provisions and not in a manner that leads to  
 absurd or nonsensical results. *State Police Ass'n of Mass. v. Commissioner*, 125 F.3d 1, 4  
 (1st Cir. 1997); *FutureSource, LLC v. Reuters, Ltd.*, 312 F.3d 281, 284-85 (7th Cir. 2002).

27 <sup>10</sup>Defendants' attempt to cast blame on Plaintiffs for purportedly offering a shorthand  
 28 quotation of the Plan is absurd. (Doc. 510, pp. 8-9.) Notwithstanding the fact that Defendants  
 offer absolutely no justification for making this argument nearly four years after the Court's

1 Giving meaning to the Minimum Benefits Formula and to § 4.2(e)'s SBA offset to  
 2 the Basic Formula as co-extensive provisions with neither one negating nor modifying the  
 3 other is not only consistent with the plain reading of the Plan and the Court's summary  
 4 judgment ruling but is compelled by fundamental principles of contract interpretation as well.  
 5 *Restatement (Second) of Contracts* § 203(a) ("an interpretation which gives a reasonable,  
 6 lawful, and effective meaning to all the terms is preferred to an interpretation which leaves  
 7 a part unreasonable, unlawful, or of no effect."); *Richardson v. Pension Plan of Bethlehem*  
 8 *Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997) ("Each provision in an agreement should be  
 9 construed consistently with the entire document such that no provision is rendered  
 10 nugatory."); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 520 (3d Cir. 1997) (plan  
 11 administrator "may not controvert the plain language of the document").

12 Defendants' proffered Plan interpretation would effectively nullify the Plan's  
 13 Minimum Benefits Formulas and other subsections including §4.2(h). Defendants' proffered  
 14 argument should also be rejected because it would result in a further unlawful and significant  
 15 reduction in accrued benefits for participants in violation of ERISA § 204(g) and the Internal  
 16 Revenue Code counterpart § 411(d)(6). See *Restatement (Second) of Contracts* § 203(a)  
 17 (preferred interpretation is one that renders the plan legal). "It is a well-settled principle that  
 18

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19 summary judgment ruling, the fact is that Plaintiffs quoted § 4.2(e) in full both in their brief  
 20 in support of their motion for summary judgment, at pp. 29-30, (Doc. 23.), and in their  
 21 statement of facts, ¶ 24. (Doc. 24.) Relevant pages of these pleadings, which pre-date the  
 22 Court's ECF system, are attached hereto as Exh. A for the Court's convenience. Defendants  
 23 also put the entire Plan into evidence in support of their motion to dismiss. (Doc. 16, Exh.  
 24 E.) To suggest that the Court was somehow misled by a shortened, bracketed discussion of  
 25 the full section under these circumstances is merely a smokescreen for Defendants' repeated  
 26 efforts to reargue, reconsider and re-litigate every issue in this case *ad nauseum*. Further, as  
 27 demonstrated herein, the quote is neither inaccurate nor misleading. Rather, it is Defendants  
 28 who have failed to consider § 4.2(e) in its entirety, which says the Basic Formula shall be  
 adjusted, and who completely disregard the same mandatory language in § 4.2(c), which  
 directs that benefits "shall not" be less than the floor contained in that Section unless  
 modified by the subparagraphs of § 4.2 that follow it.

1 ambiguously worded contracts should not be interpreted to render them illegal if a legal  
 2 construction is plausible.” *United States v. Sacramento Municipal Utility Dist.*, 652 F.2d  
 3 1341, 1346 (9th Cir. 1981); *Guthart v. White*, 263 F.3d 1099, 1104 (9th Cir. 2001). Such a  
 4 result is also contrary to the Plan itself which provides that “The Plan and Trust shall be  
 5 interpreted, administered and enforced in accordance with the Internal Revenue Code and  
 6 ERISA and the rights of Participants [and] Former Participants... shall be determined in  
 7 accordance therewith.” (Decl. of Amy Promislo, Doc. 16, Exh. E, at HW 0000377.)

8 If Defendants’ newly proffered Plan interpretation were correct, *i.e.*, that no  
 9 participant could receive the minimum benefits if they did not transfer their SBA balance to  
 10 the Retirement Plan, 74% of Garrett Plan participants would have suffered an illegal  
 11 reduction in their accrued benefits, effective January 1, 1984.<sup>11</sup> This reduction can be  
 12 demonstrated using simple logic. Practically no participants transferred their SBA to the Plan.  
 13 (Plaintiffs’ SOF ¶ 9 & Exh. A, showing that only 50 out of 8,792 retirees transferred their  
 14 SBA to the Retirement Plan.). In fact, Defendants encouraged participants not to transfer  
 15 their SBA to the Retirement Plan. (*See, e.g.*, Doc. 16, Exh. G, at HW0000426.) As set forth  
 16 in the Declaration of Claude Poulin, the introduction of a Social Security offset by Signal  
 17 to years of service worked prior to introduction of that offset was one of the main reasons the  
 18 Social Security Offset formula worked to reduce benefits because it has the impact of  
 19 lowering benefits for lower paid participants. (Doc. 353 ¶ 23.) In apparent recognition of  
 20 that fact, the Signal Plan had an identical Minimum Benefits formula to the Garrett Plan  
 21 Normal Retirement Benefits Formula for any participant whose final average compensation  
 22 was under the Social Security wage base maximum. (Doc. 353 ¶ 21.) Defendants also  
 23

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24  
 25 <sup>11</sup>Defendants have now admitted that they do not know when the Plan was amended  
 26 or adopted but believe it was well after the February 4, 1984 date on the Plan document:  
 27 “And as best we can tell, the February 4, 1984 date is probably a mistake that was put in by  
 28 the person who is now deceased, because there are clearly unexecuted, unfinished drafts,  
 lawyer drafts, being exchanged with clients after that date.” (Transcript of Status Conference  
 dated February 26, 2009 before the Hon. David K. Duncan, Doc. 507, p. 39.)

1 applied an increased SBA offset to the Basic Formula. By eliminating the availability of the  
 2 Minimum Benefits formula for participants, the Plan would have reduced benefits for 74%  
 3 of participants.

4 Although this Court found the language clear and unambiguous, in the unlikely event  
 5 the Court should find the language is ambiguous, Defendants' arguments would still fail.  
 6 In cases such as this, where the Plan does not afford discretion, Plaintiffs' reasonable  
 7 construction of the Plan should be accepted based on the doctrine of *contra preferentem* and  
 8 based on the principle that ambiguities in a contract are to be resolved against the drafter.  
 9 *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 539 (9th Cir. 1990); Richard A. Lord, 11  
 10 *Williston on Contracts* § 32:12 (4th ed.) ("it is a generally accepted principle that any  
 11 ambiguity in [contract] language will be interpreted against the drafter"). *See also Alexander*  
 12 *Mfg., Inc. Employee Stock Ownership Plan and Trust v. Illinois Union Ins. Co.*, \_\_ F.3d \_\_,  
 13 2009 WL 764561, at \* 5 (9th Cir. March 25, 2009) (construing ambiguity in contract against  
 14 the drafter).

## 15 CONCLUSION

16 For the foregoing reasons, Plaintiffs respectfully request that Defendants Motion  
 17 be denied. Plaintiffs request such further relief as is equitable and just.

18  
 19 Respectfully submitted this 13<sup>th</sup> day of April, 2009

20  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 13, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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